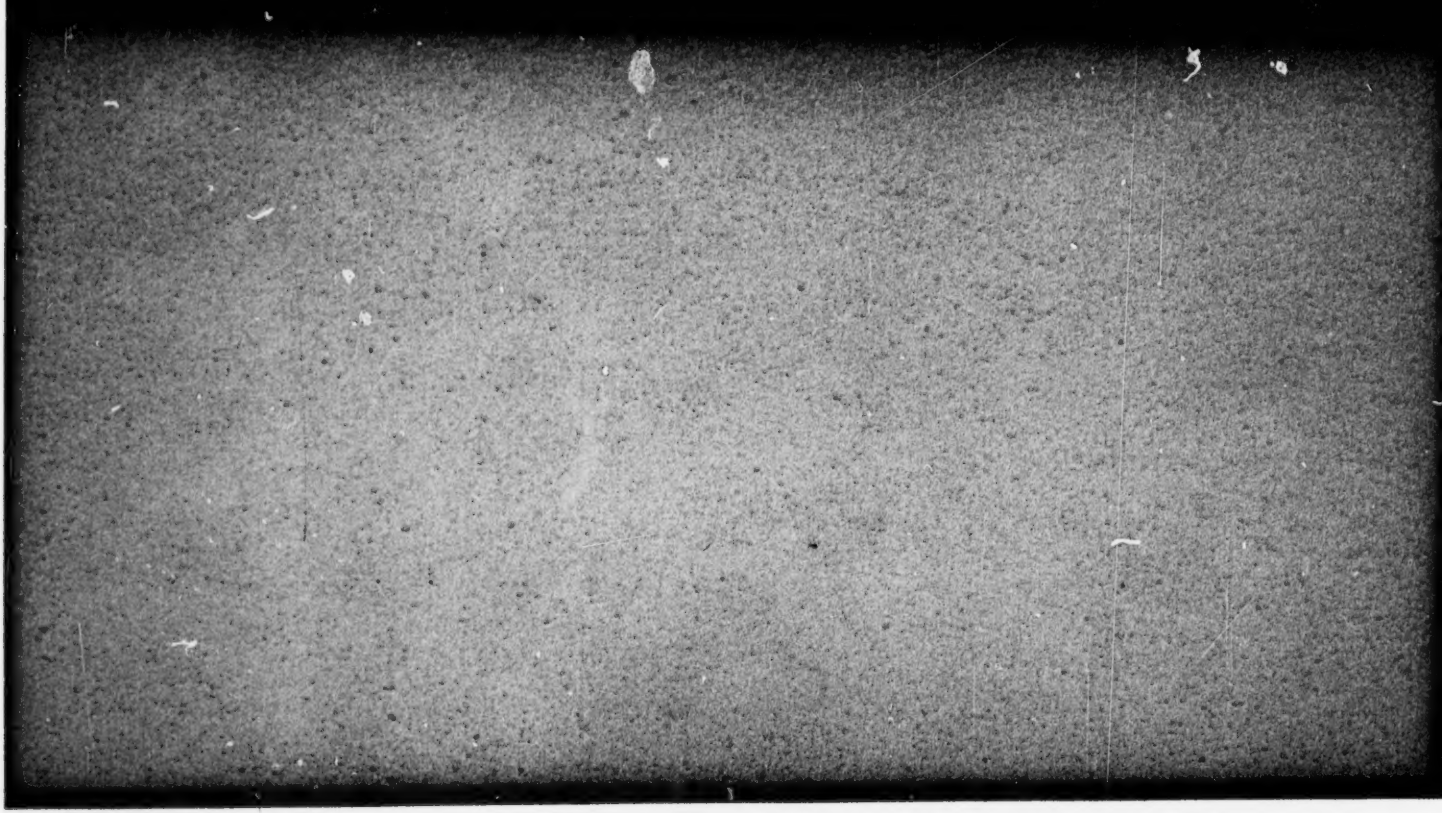

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-708

MARK SIZEMORE,
Petitioner,

-vs-

STATE OF INDIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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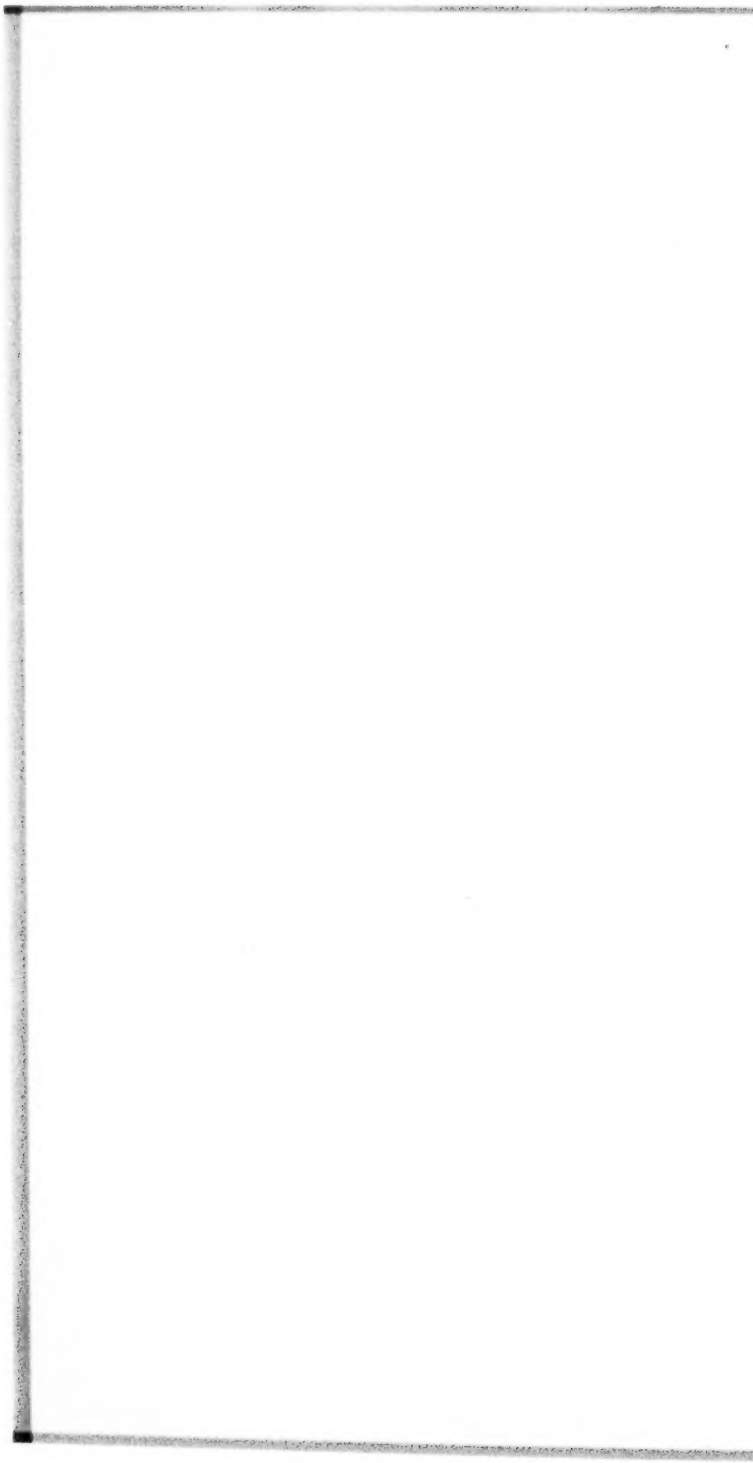

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OPINION BELOW

The opinion of the Court of Appeals of Indiana, First District, is reported in Sizemore v. State (1974) __Ind. App.____, 41 Ind. Dec. 180, 308 N.E.2d 400, and is correctly reproduced in Exhibit A of the appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition

QUESTION PRESENTED

Whether rights of the Defendant under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States were violated by the trial court's admission into evidence the fruits of a warrantless search alleged by the Petitioner to have been made without probable cause and subsequent to a non-custodial arrest.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States

(Articles of Amendment, IV, V, and XIL) are correctly set forth on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

On January 15, 1973, Terry Dean Worley and John Earl, officers of the Connersville, Indiana, Police Department, were on duty at Thirtienth Street and Ohio Avenue in said city at about the hour of midnight. They noticed a red Chevrolet van pull away from the curb in a fast manner (Tr. pp. 12,32). As they pulled behind the van, they noticed that a tail light and the license plate light were not working (Tr. p. 13). Following the van, they noticed that the driver did not come to a complete stop at the intersection

of Twenty-Eight Street and Ohio Avenue (Tr. p. 13).

As they continued to follow the van in a southerly direction, they observed the driver cross the center of the road three times. At Twenty-Fourth Street, he turned on Virginia Avenue and drove on Virginia Avenue to Twenty-Seventh Street to the left of the center line of Virginia Avenue (Tr. p. 13). As a result of the lights being out and the driver's erratic driving, they stopped him at Twenty-Fourth Street and Ohio Avenue. The driver and sole occupant of the car was Mark Sizemore, Petitioner herein (Tr. p. 13).

Officer Earl arrested Petitioner for his faulty lighting and asked to

see his driver's license (Tr. pp. 14, 34). As he examined Petitioner's license and questioned him concerning his lights, Worley observed him and, because of his manner of driving and his manner during questioning, concluded that he was driving under the influence of intoxicating liquor or narcotic or other habit-forming or dangerous or depressant or stimulant drugs in violation of Section 9-4-1-54 of Indiana Code 1971 and decided to arrest him for that offense (Tr. pp. 14,17,18, 34, 63).

Petitioner appeared to be staring past Worley and did not react normally when a flashlight was shined in his eyes (Tr. pp. 23,37). He conducted a

"pat-down" search of Petitioner and discovered a bulge in his left breast pocket. (Tr. pp. 17,63). Asked what it was, Petitioner replied that he did not know. Worley reached into the pocket and removed a hand-rolled cigarette. A field test conducted by Sheriff Max Huffman in Worley's presence with a Val-Tax Testing Device identified the the cigarette as containing marijuana. Subsequently Paul Asa, of the Indiana State Police, conducted a microscopic examination and subjected the substance to thin layer chromatography and determined that the cigarette contained marijuana (Tr. pp. 69,87,103,104,106). The officers noticed that the pupils of Petitioner's eyes were dilated and he

kept licking his mouth as if it were dry (Tr. p. 37).

SUMMARY OF THE ARGUMENT

The rights of Petitioner under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States were not violated by the trial court's admission into evidence of the fruits of a warrantless search alleged by Petitioner to have been made without probable cause and subsequent to a non-custodial arrest because:

1. Petitioner's erratic driving before being stopped created probable cause for more than a "routine traffic arrest".

2. The officers had probable cause to believe Petitioner was guilty

of driving under the influence of intoxicating liquor or narcotic or other habit-forming or dangerous or depressant or stimulant drugs.

3. Officer Worley determined to arrest Petitioner for driving under the influence before conducting a search of his person.

ARGUMENT

THE RIGHTS OF PETITIONER UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE NOT VIOLATED BY THE TRIAL COURT'S ADMISSION IN EVIDENCE OF THE FRUITS OF A WARRANTLESS SEARCH ALLEGED BY PETITIONER TO HAVE BEEN MADE WITHOUT PROBABLE CAUSE AND SUBSEQUENT TO A NON-CUSTODIAL ARREST

Petitioner's arguments supporting his Petition for a writ of certioari rest upon erroneous statements. The first is his statement that "the trial

and first appeal of this cause all took place before this Court's decisions in Gustafson and Robinson." United States v. Robinson, 414 U.S. 218, 94 S.Ct.467 38 L.Ed.2d 427, and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 436, were decided December 11, 1973. Appellee's brief in Sizemore v. State, (1974) ___ Ind. App.____, 41 Ind. Dec. 180, 308 N.E.2d 400, the instant case, was filed on December 28, 1973,seventeen days later, and cites both cases. Petitioner had an opportunity to discuss said cases thereafter in his reply brief. The Court of Appeals decision was handed down March 19, 1974, and discussed both cases.

His second erroneous statement is

that he was stopped by the officers and arrested for a "routine traffic violation". While a defective tail light and license plate light may constitute a routine traffic violation, driving under the influence does not. Before the officers stopped Petitioner, he had crossed the center line of the highway three times in six blocks and then driven on the left side of the highway for a distance of three blocks. Such driving clearly indicated that something was seriously wrong with the driver of the car and public safety demanded he be removed from the highway before he killed someone. That could not be accomplished by a mere citation to appear in court.

The Court of Appeals of Indiana

attempted to correct that erroneous statement of Petitioner on page 406 of 308 N.E.2d of its opinion, where it said:

> "Initially, we must disagree with Sizemore's apparent assumption that the search was incidental to his arrest for operating his vehicle with a tail light burned out. The following testimony of officer Terry Worley during the hearing on the motion to suppress reveals that the search was incident to a valid arrest for driving under the influence:
>
> "Q. And, uh, why did you give this search?
>
> "A. I would say that after the coodination test and everything I felt like he was under the influence of something. I was going to place him under arrest. I was going to place him in the vehicle, and before I do this I must search him for anything that might harm himself or me."

If the officers had merely handed Petitioner a traffic ticket for driving with defective lights and sent him on his way, in view of what they had observed of his driving, they would have assumed the responsibility for subjecting all other travelers on the highway to imminent danger of injury or death at the hands of a driver whose mental capacity to drive was obviously impaired. If they had taken him into custody without first searching his person, they would have been gambling with their own lives and the possibility of Petitioner's escape.

Petitioner erroneously characterizes the decision of the Court of Appeals of Indiana as interpreting "the

Gustafson and Robinson decisions as as allowing a full-scale search of anyone who violates any traffic regulation." The opinion of the Court of Appeals is not subject to that interpretation and Petitioner points to no language justifying such an interpretation. The Court of Appeals made a factual determination from the record that Petitioner's search was not incidental to his non-custodial arrest for defective lighting on his car but to his custodial arrest for driving under the influence. The arresting officers had observed Petitioner's erratic driving and, upon stopping him, his manner and demeaner constituting probable cause to arrest him for driving under the influence.

Petitioner argues that the officers had the right to search him only for weapons and that, when it became obvious that he was not armed, the search should have ceased. He contends that the bulge in his shirt pocket could not possibly have been a weapon. A knife perhaps? The officers asked him what it was and he said he did not know. Such answer was obviously false and served to strengthen the officer's belief that Petitioner was under the influence of drugs and, therefore, driving illegally —beyond a mere traffic code violation.

The mere fact that a search precedes the ritual of stating to an accused, "You are under arrest for____," does not preclude the search from being

incidental to such arrest. Harris v. United States (1947), 331 U.S. 145, 67 S.Ct. 1098; Mann v. State (1973), ____Ind. App. ___,292 N.E.2d 635; Smith v. State (1971), 256 Ind. 603, 271 N.E.2d 133. For all practical purposes, Petitioner was under arrest as soon as he was forced to stop his car and get out. That is especially true since, prior to stopping him, the officers had probable cause to arrest him for driving under the influence. Drugs are usually carried on the person of the user and, the officers were justified in searching Petitioner to make sure he did not dispose of whatever drugs he carried before reaching the station house and also to make certain he had nothing that could

be used as a weapon in resisting arrest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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